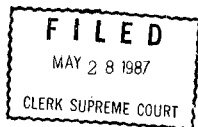


IN THE COURT OF APPEALS OF IOWA



IN THE INTEREST OF J.L.L.,
A Minor Child,

Filed May 28, 1987

L M L., Natural Mother,

7-89
86-1248

174

Appellant.

Appeal from the Iowa District (Juvenile) Court for Clay County (1203),
Emery H Emerson, Jr., Juvenile Court Referee.

The natural mother of a three-year-old girl challenges the juvenile court
order terminating her parental rights pursuant to Iowa Code chapter 600A.

AFFIRMED.

Douglas L. Hein, Spencer, for appellant mother.

Randall L. Nuebel, Spencer, for appellee (paternal uncle).

Bradley Howe of Sackett, Sackett, Hemphill & Howe, Spencer, guardian
ad litem for the child.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J.

The subject of this termination proceeding, J.L.L., was born on October 25, 1983, to J.L. and L.M.L. The minor child resided with her natural parents until January 7, 1986, at which time L.L., J.L.'s brother, took custody. The change of custody was facilitated through the execution of a Release of Custody, which both parents signed and which allowed the minor child to be placed for adoption. On April 17, 1986, L.L. filed a petition for termination of parental rights in the juvenile court of Clay County. On April 24, 1986, an order for hearing was filed scheduling the hearing on the petition for termination of parental rights for May 21, 1986. A guardian ad litem was appointed for the minor child. On May 5, 1986, a return of original notice was filed by the Sheriff of Clay County whereby it was certified that the natural parents were personally served with the notice of the termination hearing on May 1, 1986. On July 8, 1986, an order was issued changing the hearing date to July 23, 1986, notice of this change was mailed to the natural parents. The mother filed a request for continuance on July 18, 1986, seeking a continuance due to their inability to find legal counsel. This request was denied.

On July 23, 1986, the termination hearing was held. The natural father, the petitioning uncle, and the child's guardian ad litem all appeared. The natural mother, appellant, did not attend the termination hearing. The juvenile court referee filed his findings of fact on July 24, 1986, in which he extinguished the parent-child relationship and appointed L.L. and his wife guardians and custodians of J.L.L. From this order the natural parents filed a request for appeal and appointment of counsel on August 4, 1986. The district court construed this request as motion for new trial and dismissed it as untimely. However, the court found the natural parents indigent and appointed them

counsel. The appointed counsel filed a notice of appeal for the natural mother on August 25, 1986.

The natural mother contends: the trial court erred in terminating her parent-child relationship where she was without legal counsel and had not been advised by the court of her right to legal counsel; the court abused its discretion in denying her request for continuance; and the court erred in proceeding with the termination hearing when no valid waiver of the reporting requirement had been made by the appellant.

Our review of the record on appeal of termination of parent-child relationship is de novo. In Interest of Goettsche, 311 N.W.2d 104, 106 (Iowa 1981).

I.

The first issue is whether appellant had the right, under Iowa law, the Iowa Constitution, or the due process and equal protection clauses of the federal constitution to be specifically informed of her right to counsel.

It is the undisputed law of this state that an indigent in certain circumstances may have a constitutional right to court-appointed counsel in a proceeding to terminate parental rights, but the indigent must first carry the burden of establishing the allegations of indigency. Matter of Jacobs, 309 N.W.2d 481, 483 (Iowa 1981). Appellant admits she made no formal written request showing her indigency for the appointment of counsel prior to the appeal. However, she suggests we go beyond the established right and create a duty in the juvenile referee to inform her of her right to appointment of counsel.

The petition for termination of parental rights was filed pursuant to chapter 600A of the Iowa Code, which provides for the voluntary termination of parental rights. This chapter allows the filing of a release of custody to be the foundation on which to subsequently file a petition for termination

of parental rights. Iowa Code § 600A.4(3) (1985). The parties' release of custody substantially conformed to the necessary elements found in section 600A.4(1). See In Interest of C.K., 315 N.W.2d 37, 40-41 (Iowa 1982). No statutory section exists for the appointment of counsel in a chapter 600A voluntary termination. Section 232.113 of the involuntary termination proceeding requires that the parents involved in the termination proceeding have counsel. See In re Loeffelholz, 162 N.W.2d 415, 426 (Iowa 1968) (requiring court in an involuntary termination proceeding to determine whether the right to counsel has been knowingly and voluntarily waived); Annotation, Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary termination of Parental Rights, 80 A.L.R.3d 1141 (1977).

The distinction between voluntary and involuntary termination proceedings is crucial to this review. The principle distinction is that an involuntary proceeding is brought by the state, while the chapter 600A is initiated by the parent, at least in this case, through the signing of a release of custody. See Matter of Jackson, 115 Mich. App. 40, 51, 320 N.W.2d 285, 289 (1982). The reason for court-appointed counsel in involuntary termination proceedings was succinctly set forth as follows: "Parental rights to children involve a natural and fundamental aspect of personal liberty. Moreover, the proceedings involve issues and questions of great complexity pitting the parent against the vast and overwhelming resources of the state." Catz and Kuelbs, The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area, 13 J.Fam.L. 223, 244 (1973-74). Also, petitions for involuntary termination are often based on criminal activity, making the need for counsel all that more necessary. Lassiter v. Department of Social services, 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640, 650 n.3, reh'g. den. 453 U.S. 927 (1981).

No authority exists for appellant's proposition that assistance of counsel is required before parental rights may be voluntarily terminated. However, other courts have held that a natural parent who voluntarily relinquishes his or her parental rights cannot later complain that they were entitled to have counsel appointed at the voluntary relinquishment proceeding. Matter of Adoption of Christopher P., 480 Pa. 79, 87-88, 389 A.2d 94, 98-99 (Penn. 1978); In re Adoption of R.L., 455 Pa. 29, 32, 312 A.2d 601, 602 (1973); Watson's Appeal, 450 Pa. 579, 585, 301 A.2d 861, 865 (1973) (a natural mother who institutes proceedings to terminate her parental rights voluntarily cannot later complain that she should have had counsel appointed for her); and In re Adoption of Hoffman, 61 Ill.2d 569, 338 N.E.2d 862 (1975), cert. denied, 425 U.S. 958, 96 S. Ct. 1738, 48 L. Ed. 2d 202 (1976) ("While it may be desirable for the natural parents of a child to have legal counsel prior to consenting to the adoption of the child, we do not find it to be constitutionally required . . ."). We agree with this body of law and find no right to assistance of counsel in a voluntary termination proceeding. But once the termination ceases to be voluntary the indigent's right to counsel, as set forth in Jacobs, 309 N.W.2d at 483, becomes applicable. We find that a parent's intended showing of good cause for revocation of the custody release, as provided by section 600A.4(4), transforms the proceeding into an involuntary termination and thereby invokes the Jacobs right to counsel. In both the telephone calls and written request appellant never set forth her need for counsel, she only offered a bare request for the appointment of counsel. Therefore, we find this remained a voluntary termination proceeding. Furthermore, appellant did not prove her indigency prior to the request for appeal.

When assistance of counsel is a constitutional requisite, the right to have counsel appointed does not depend on a party's request. Carnley v.

Cochran, 369 U.S. 506, 513-16, 82 S. Ct. 884, 889-90, 8 L. Ed. 2d 70, 75-79 (1962). However, since neither a statutory nor constitutional right exists to the appointment of counsel in a voluntary termination proceeding, we decline to assign to the trial court a duty to inform the parties of a right to counsel.

II.

Appellant contends the trial court abused its discretion in denying her request for continuance. In response to her phone call the juvenile referee, on July 19, 1986, called the natural mother and denied her request for a continuance of the July 23rd hearing. Appellant based her request on her inability to find counsel, while the court denied the request because petitioner and his wife had already traveled from Odessa, Texas, and she was notified of the hearing in May of 1986. Appellant filed a written request of continuance on July 21, 1986, which was orally denied at the July 23, 1986, hearing.

The granting or denial of a motion for continuance is within the broad discretion of the trial court and will be interfered with on appeal only where there has been a clear abuse of discretion and injustice has been done to the party seeking the continuance. Matter of Estate of Lovell, 344 N.W.2d 576, 578 (Iowa App. 1983). Ordinarily, an abuse is found only where there is no support in the record for the trial court's determination. Michael v. Harrison County Rural Electric Co-op, 292 N.W.2d 417, 419 (Iowa 1980).

The trial court refused to grant the requested continuance because the petitioner had arrived from Texas for the proceedings and the parties had known of the impending hearing for several months. These support the court's denial of appellant's request. Further, we note that the orderly conduct of business in the district court is within the sound judicial discretion of the trial court. In re Estate of Croulek, 252 Iowa 700, 706, 107 N.W.2d 77, 80-81 (1961). We find no abuse of discretion.

III.

Finally, appellant contends the trial court erred in proceeding with the termination hearing when no valid waiver of the statutory reporting requirement had been made by her.

The hearing for termination for parental rights shall be conducted according to the rules of civil procedure and sections 232.91 to 232.96. Iowa Code § 600A.7(1) (1985). Regarding reporting requirements, section 232.94 provides: "Stenographic notes or electronic or mechanical recordings shall be taken of all court hearings held pursuant to this division unless waived by the parties."

In the present case, appellant did not attend the July 23, 1986, hearing. Her husband, the natural father, however, did appear. Also present was the petitioner, the child's guardian ad litem, and several witnesses. All parties present at the termination proceeding waived the requirement of a record. On appeal the natural mother contends that she did not waive the reporting requirements and therefore, reversible error was committed. We disagree.

In reference to the need for the natural parents at the termination proceeding, section 232.91 provides in pertinent part: "Any hearings or proceedings under this division subsequent to the filing of a petition shall not take place without the presence of the child's parent, guardian, custodian, or guardian ad litem in accordance with and subject to section 232.38." Section 232.38 further provides:

Any hearings or proceedings under this division subsequent to the filing of a petition shall not take place without the presence of one or both of the child's parents, guardian or custodian except that a hearing or proceeding may take place without such presence if the parent, guardian or custodian fails to appear after reasonable notification. . . .

Appellant argues that if the legislature intended for section 232.94 to provide for reporting unless waived by all parties present, they could have provided

for inclusion of this word. This contention fails to recognize what the legislature did provide, which is the allowance of a hearing without the presence of a parent after reasonable notification. Appellant had full notice of the July 23, 1986, hearing. This is evidenced by her oral and written request for continuance and the presence of the natural father at the hearing.

Appellant cites In re Loeffelholz, 162 N.W.2d 415 (1968), for the proposition that in a termination proceeding the trial judge should determine whether the right to counsel and record of proceedings has been knowingly and voluntarily waived. Id. at 426. However, she fails to note that case involved a juvenile proceeding to have the children declared neglected and an involuntary termination of parental rights. As already mentioned, no such rights exist for the natural parent involved in a voluntary termination. Appellant was reasonably and fully notified of the termination in May 1986, this fact is not in dispute. Although she had problems in finding legal representation that does not excuse her from attending the hearing. It is a general rule that, "one who through carelessness or inattention to duty, brings misfortune upon himself, will not, as a rule, be heard to complain." Mishler v. Stouwie, 301 N.W.2d 744, 748 (Iowa 1981). On appeal appellant seeks reversal on the fact she did not waive her right to a record. We decline to accept this contention since, upon full notification, she failed to attend the termination hearing and, through that lack of action, waived any right she had to complain of the procedures used at the hearing.

AFFIRMED.

Donielson, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I agree with the majority's statement, "The distinction between voluntary and involuntary proceedings is crucial to this review."

I also agree with the majority's statement, "But once the termination ceases to be voluntary the indigent's right to counsel as set forth in Jacobs, 309 N.W.2d at 483, becomes applicable."

I also agree with the majority's statement, "When assistance of counsel is a constitutional requisite, the right to have counsel appointed does not depend on a party's request."

Where I disagree with the majority is their finding that this termination proceeding was voluntary. The natural parents filed a request for continuance on July 18, 1986, seeking a continuance due to their inability to find legal counsel. I would hold that when nonlawyer litigants inform the court they are seeking an attorney to represent them at a hearing, that is a sufficient notice to a law-trained judge that the proceedings are no longer voluntary. There is no dispute that the parents are indigent. Since the termination proceedings were not voluntary, an attorney should have been appointed for the natural parents.